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## Imperfect Takings

Shai Stern

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# IMPERFECT TAKINGS

*Shai Stern\**

## ABSTRACT

*Three concerns are inherent to the power of eminent domain — when a government forcibly takes away private property to provide a social good: abuse of this power, unfair distribution of burdens among members of society, and inefficient implementation of the government project. To protect against these undesirable outcomes, expropriation laws in most Western jurisdictions incorporate three safeguards: due process, a public use requirement, and mandatory compensation. While jurisdictions implement these safeguards in different ways, most demand their implementation as a prerequisite for legitimate expropriation. Arguably, the purpose of allowing governments to expropriate private property is to provide for important societal needs. But this conflicts with the idea that the government ought to perfectly adhere to the three aforementioned safeguards at all times. Imperfect circumstances, such as times of crisis, likely require governments to provide for the needs of their citizens, but afford insufficient time for standard due process. Imperfect implementation of the three safeguards may also be necessary when authorities struggle with budgetary limitations that prevent full compensation, or when they are unable to meet a social need without the involvement of private entities. In all these imperfect circumstances, at least one of the safeguards might be compromised if the government is to provide required social needs through expropriation.*

*This Article proposes a novel model to conceptualize eminent domain, which identifies an interplay among expropriation laws' three*

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\* Faculty of Law, Bar Ilan University. I am grateful to Gregory S. Alexander, Joseph S. Singer, Hanoch Dagan, Laura Underkuffler, Stephanie M. Stern, Katrina M. Wyman, Thomas Mitchell, Gideon Parchomovsky, Abraham Bell, Ernst Marais, Shelly Kreiczler-Levy, Yifat Holzman Gazit, Tsilly Dagan, Avital Margalit, Manal Totry Jubran, and others for their perspective, comments, and suggestions on earlier drafts.

*safeguards. It further recognizes that each of these safeguards protects, to some extent, against all three of the potential dangers inherent in government's expropriation power. This innovative interplay model legitimizes compromise, such that it is appropriate for there to be only partial implementation of one safeguard as long as the other two are strictly applied. The interplay model proposed in this Article, therefore, allows the government to exercise its expropriation power properly even in imperfect circumstances, while still sufficiently protecting property owners and society from abuse of that power.*

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## INTRODUCTION

Takings law, the power of the government to acquire property from unwilling property owners to further its citizens' needs and interests, is well-rooted in American property jurisprudence.<sup>1</sup> Through this power, the government aims to overcome obstacles threatening its ability to fulfill the essential needs of its citizens, such as sidewalks, roads, educational institutions, medical institutions, and workplaces. These essential needs of society often require the purchase of land for their implementation. For example, if the government aims to build a new highway, it must purchase the land on which the highway is to be built. Clearly, it is desirable to realize these essential goals in an agreed upon manner, through voluntary acquisition of the land from the owners. However, there are

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1. For a comprehensive review of the role of eminent domain in American property jurisprudence, see William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972); Laura Mansnerus, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409 (1983). See also RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 35–37 (1985).

situations where such a voluntary acquisition is not possible. One of the main obstacles governments face in providing for society's needs is market imperfection. Market failures, such as holdouts and free riders, may prevent the government from purchasing land voluntarily and may therefore threaten government's ability to meet society's needs.<sup>2</sup> The government's power to forcefully take private property, therefore, is considered an essential instrument that allows it to realize its underlying purpose— fulfilling society's needs.<sup>3</sup>

However, while this power can be useful to the government in overcoming obstacles that may prevent it from meeting the needs of its citizens, its use raises three primary concerns. First is corruption: the government might improperly use its power to take private property even when there is no justification for doing so. Second is fairness: government taking of private property raises concerns about the fair allocation of burdens among society members, particularly where one property owner is forced to sacrifice for the benefit of the community. This concern raises questions about the scope and scale of the obligations that owners have toward their communities<sup>4</sup> and

2. The most prominent market failure discussed in the literature, known as the "holdout" problem, relates to the transactional costs that arise when multiple land parcels are required to facilitate the implementation of the public need; most agree that one party prevents or delays this implementation by delaying the voluntary purchase. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 606 (1986); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 40–41 (2d ed. 1970); Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473 (1976); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006) ("The primary objection to substantive limits on the eminent domain power is that holdouts may impede socially beneficial projects."); cf. Bruce L. Benson, *The Mythology of Holdout as a Justification for Eminent Domain and Public Provision of Roads*, 10 INDEP. REV. 165, 166 (2005). While market failures are considered the prominent justification for government takings power, both the literature and case law suggest another justification based on distributive justice and the government's commitment to ensure equality. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (upholding the constitutionality of land-reform measures that target oligopolistic owners and redistribute some of their land titles as falling within the takings clause); see generally Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999); Jeffrey M. Gaba, *Taking Justice and Fairness Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569 (2007).

3. See, e.g., *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459 (Mich. Sup. Ct. 1981) (quoting Justice Cooley in *People ex rel. Detroit Howell R.R. Co. v. Salem Twp. Bd.*, 20 Mich. 452, 480–82 (Mich. Sup. Ct. 1870), who said, "the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable . . .") *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. Sup. Ct. 2004) (overruling *Poletown Neighborhood Council* on other grounds).

4. See, e.g., Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127 (2009); Gregory S. Alexander, *The*

the fairness of forced reallocation of burdens when the beneficiaries include other individuals. Third is inefficiency: the government's use of its takings power — which, because of its coercive nature, operates outside the boundaries of the free market — raises concerns about potential inefficiencies involved in realizing the public need. Specifically, use of the takings power raises two fundamental questions: Whether the government will be able to internalize the social costs involved in realizing the public project for which the property was taken, and how the investment policy of current and prospective landowners will be affected.<sup>5</sup>

These concerns shape current takings law, which aims to address each of these issues by incorporating three safeguards. First is a procedural safeguard, manifested by the government's duty to provide owners with due process to reduce concerns of governmental misuse of takings power.<sup>6</sup> Second is the fairness safeguard, which requires that the taken property be used only for public needs; this sketches the boundaries of owners' obligations to their communities and prevents governments from using their takings power to improperly redistribute property among private individuals. Third is the efficiency safeguard, actualized by the duty of the government to compensate owners for the taken property,<sup>7</sup> which prevents ineffectiveness in the execution of the public project for which the property was taken. These three safeguards provide triangular protection against the three inherent concerns that arise from the government's takings power. However, what happens when none of these safeguards can be fully realized? Can governments use their takings power to confiscate private property even when doing so might compromise due process, the publicness of the use, or just compensation? If so, under what circumstances can such a compromise be legitimized?

This Article contends that takings law cannot be blind to imperfect circumstances. Emergencies, crises, and budgetary limitations are an undeniable part of everyday reality, and ignoring them may result in situations where the underlying good that governmental taking can promote is overshadowed by the harms that arise in such imperfect

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*Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2008); Hanoch Dagan, *Property and the Public Domain*, 18 YALE J.L. & HUMAN. 84 (2006); Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 (2006).

5. See *infra* text accompanying notes 17–22.

6. See *infra* text accompanying notes 24–28.

7. See *infra* text accompanying notes 35–36.

circumstances. By the same token, insisting on the full realization of all the safeguards implicated by takings law, regardless of the circumstances, may harm the government's ability to make use of its power, leaving society's needs unfulfilled.

This Article demonstrates that, although each of the safeguards in takings law provides protection against a particular concern, each one simultaneously provides ancillary protection against the other two concerns as well. In this sense, each of the three safeguards incorporated in takings law protects against each of the three concerns inherent in confiscation of private property. These overlapping protections provided by the safeguards allow for an interplay between them. Governments can ease the implementation of one safeguard as circumstances require, while still maintaining an adequate level of protection against all three inherent concerns. This interplay between takings law's safeguards reduces the need for all safeguards to be fully implemented in every circumstance — even when one of the safeguards is not fully implemented, it is still possible to provide adequate protection against the concern it was originally intended to assuage. Indeed, since each safeguard protects against all three of takings law's inherent concerns to some degree, even if the government compromises on one of the safeguards, the interplay identified here will still provide proper protection against all three concerns. Another important aspect of the interplay model is the application of safeguards in a nonbinary manner, such that each of the safeguards can be applied in several different ways. At bottom, by recognizing and implementing this flexible interplay model, decision-makers, legislators, and courts have a predictable framework for adjusting takings law to imperfect circumstances.

With these insights in mind, any compromise on takings law's safeguards must be contingent on two conditions. First, only one of the safeguards can be compromised at any given time, and even then, the safeguard cannot be completely relinquished. This means that even though imperfect circumstances may require a softening in the realization of one of the safeguards, they can never serve as an excuse for governments to ignore or waive that safeguard completely. Second, when one of the safeguards must be compromised, and so is only partially realized, the other two safeguards should be implemented in a stricter manner.

This Article proceeds in four parts. Part I discusses in detail the concerns inherent to governments' use of takings power: governmental abuse of its power, unfair distribution of burdens, and inefficiency in the project's implementation. Part II demonstrates how takings law incorporated three safeguards to address these

concerns. The procedural safeguard (through the requirement of due process) is meant to mitigate against governmental corruption; the fairness safeguard, by requiring that expropriation be done only for public use, is meant to ensure a fair distribution of burdens; and the efficiency safeguard, through the compensation requirement, aims to ensure economic efficiency in the exchange being facilitated. Part III identifies the interplay between takings law's three safeguards, which is based in the recognition that although each of them provides primary protection against a certain concern, they all provide secondary protection from the other two as well. This Part continues to discuss the implications of the interplay model, which provides a platform for legitimate takings even in imperfect circumstances. Part IV shifts the proposed interplay model from theory to practice and provides an explanation of takings jurisprudence that seemingly stands at odds with current takings law. This allows a rethinking of old conventions in takings jurisprudence.

#### **I. THE POWER TO TAKE PRIVATE PROPERTY: IMPORTANCE AND INHERENT CONCERNS**

Many governments possess the power to acquire property from unwilling property owners to further the general welfare. This power, which interferes with owners' property rights, is legitimate in most Western legal jurisdictions and is often used by governments to overcome market failures that prevent the efficient implementation of public needs.<sup>8</sup> Compulsory acquisition of private property, however, also gives rise to concerns that are inherent in governmental actions that take a coercive form. Three such inherent concerns have shaped current takings law: governmental abuse of power, unfair distribution of burdens, and inefficiency.

One of the fundamental premises underlying governmental expropriation powers is that a government will likely encounter difficulties when attempting to provide various social needs to its citizens. Some of the most significant challenges include, for example,

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8. On the power of eminent domain in the American legal system, see JESSE DUKEMINIER ET AL., *PROPERTY* 895–996 (2006). On the history of eminent domain in the United States, or its equivalents in other countries, see NICHOLS ON EMINENT DOMAIN § 1.1 (2006). For a comprehensive review of how constitutions in different jurisdictions address expropriation of private property, see A.J. VAN DER WALT, *CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS* (1999). For a comparison of constitutional treatment of expropriation in the United States, Germany, and South Africa, see GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* (2006).

the supply of public goods, or overcoming inherent market failures such as holdouts and free riders.<sup>9</sup> However important the takings power is to governments, it must be carefully exercised and executed — indeed, governments' ability to expropriate private property raises a familiar concern: that corruption, greed, or inattentiveness might lead to misuse of this power.<sup>10</sup> That is, authorities who can legally take property through coercion might use this power when the property ought to have been bought in the free market.<sup>11</sup> If unchecked, the governmental takings power might be abused to convey property to those close to power or to achieve hidden goals.<sup>12</sup>

Compulsory acquisition of property rights by governmental authorities raises additional concerns relating to fairness.<sup>13</sup> While the Fifth Amendment to the United States Constitution allows the federal government to take private property in order to provide for public needs, exercising this power raises two distributive

9. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 5 (1985); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 82 (1986); Thomas J. Miceli & C.F. Sirmans, *The Holdout Problem, Urban Sprawl, and Eminent Domain*, 16 J. HOUSING ECON. 309 (2007).

10. See, e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 605 (1986) (“Concerns about abuse of power are potentially far more important in the context of takings than in most other transition contexts precisely because takings often single out individuals or groups . . .”).

11. See, e.g., Michael A. Lang, *Taking Back Eminent Domain: Using Heightened Scrutiny to Stop Eminent Domain Abuse*, 39 IND. L. REV. 449, 453–54, 467 (2006); Jeffrey W. Scott, *Public Use and Private Profit: When Should Heightened Scrutiny Be Applied to “Public-Private” Takings?*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 466, 473–74 (2003).

12. See, e.g., DANA BERLINER, *OPENING THE FLOODGATES: EMINENT DOMAIN IN THE POST-KELO WORLD* 7 (2006), <http://castlecoalition.org/pdf/publications/floodgates-report.pdf> [<https://perma.cc/JL8Q-738X>] (documenting over 5,000 actual or threatened cases of private takings between June 2005 and June 2006); DANA BERLINER, *PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN* (2003), [https://ij.org/wp-content/uploads/2015/03/ED\\_report.pdf](https://ij.org/wp-content/uploads/2015/03/ED_report.pdf) [<https://perma.cc/7RW5-WHVN>] (documenting over 10,000 actual or threatened cases of private takings from 1998 through 2002 and demonstrating how takings often abuse poor neighborhoods and elderly residents); see generally Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 FORDHAM URB. L.J. 1119 (2010).

13. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).



difficulties.<sup>14</sup> First, should a private owner bear the burden of providing for the needs of society? Second, what is the scope and scale of the public need that justifies using takings power? Both questions relate to the notion of fairness in the exercise of power by government in different ways. As Justice Chase outlined as early as 1798 in *Calder v. Bull*, neither reason nor justice may justify the government's ability to take property from "A" and give it to "B."<sup>15</sup> Over two hundred years later, courts and scholars still struggle with questions of fairness relating to coercive state powers and the taking of private property.<sup>16</sup>

The final concern is that governments exercising their compulsory acquisition powers might ignore efficiency considerations as they execute the public project.<sup>17</sup> This criticism mainly stems from the fact that compulsory takings circumvent free market mechanisms, highlighting the lack of efficient economic frameworks for government expropriation. The government's actions will ultimately be inefficient if it disregards the inherent value of the property when it calculates the economic efficiency of fulfilling the public need.<sup>18</sup> Prevalent in the commentary on this topic is the assertion that the government might be caught up in a "fiscal illusion" that will cause it to disregard the value of the taken property when calculating the project's costs.<sup>19</sup> According to the "fiscal illusion" argument, governments ignore costs that are not reflected in the budget of the

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14. *Id.*; see also Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 742–43 (1999).

15. See *Calder v. Bull*, 3 U.S. 386, 387–88 (1798).

16. See generally *Kelo v. City of New London*, 545 U.S. 469 (2005); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491 (2005); Eric L. Silkwood, *The Downlow on Kelo: How an Expansive Interpretation of the Public Use Clause Has Opened the Floodgates for Eminent Domain Abuse*, 109 W. VA. L. REV. 493 (2006); ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* (2015).

17. See, e.g., Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1001 (1999) ("[T]o relieve the government of any obligation to pay is to forgo an opportunity to test whether the benefits of a government program are truly worth its costs, an important matter when the benefit-cost call is a close one.").

18. *Id.*

19. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 51 (4th ed. 1992) ("A straight forward economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power.").

project itself.<sup>20</sup> Government officials who suffer from the fiscal illusion will tend to engage in inefficient exercises of eminent domain, since they only see the public benefit of takings while ignoring the cost to the property owners.<sup>21</sup> On the other side of the takings equation, property owners' investment policies might be distorted because of concerns about future governmental takings of their land, leading to an inefficient process.<sup>22</sup>

These three concerns are inherent in government's compulsory acquisition of property. They stem from the forced nature of the government's action and its execution outside the margins of the free market, as well as from the intrinsic characteristics of governmental action and the relationship between the government and those close to power.<sup>23</sup> In most Western jurisdictions, governmental takings law has aimed to address these inherent concerns by incorporating three legal safeguards against coercive acquisition.

## II. THE TRIANGULAR SAFEGUARD MECHANISM OF TAKINGS LAW

To address the three inherent concerns of governmental expropriation of private property, takings law incorporates three safeguards. The first safeguard — termed the “procedural safeguard” — binds takings power with the demands of due process. The Fifth Amendment specifically states that “[n]o person shall be . . . deprived of life, liberty, or *property*, without due process of law.”<sup>24</sup> Taken together with the Fourteenth Amendment, which states that “nor shall any state deprive any person of life, liberty, or *property*, without due process of law[.]”<sup>25</sup> the Constitution affords property owners the right to due process in both federal and state government confiscations.<sup>26</sup> The scope and scale of these procedures, however,

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20. See Ronit Levine-Schnur & Gideon Parchomovsky, *Is the Government Fiscally Blind? An Empirical Examination of the Effect of the Compensation Requirement on Eminent-Domain Exercises*, 45 J. LEGAL STUD. 437, 438 (2016).

21. See *id.*

22. See Lawrence Blume et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 Q. J. ECON. 71, 72 (1984).

23. On the concern that governments will execute coercive acquisition to the benefit of those close to power, see, e.g., Heller & Krier, *supra* note 17, at 1001 (“If compensation were not required, politicians would be inclined to support government projects that benefit the privileged at the expense of the vulnerable.”).

24. U.S. CONST. amend. V (emphasis added).

25. U.S. CONST. amend. XIV (emphasis added).

26. See D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L.J. 1280, 1282–83 (2010).

vary from state to state.<sup>27</sup> Governments' power to take private property is conditioned upon providing owners with due process to reduce the concern of governmental abuse.<sup>28</sup> When owners are informed about expected expropriation and receive an opportunity to express their protest, the likelihood of state abuse of power decreases.

Another safeguard incorporated into takings law, the "fairness safeguard," refers to the requirement that expropriated property be taken only for public use. The demand that the governmental taking be for a "public use,"<sup>29</sup> "public need," or "public interest" has been implemented in most Western governmental takings laws.<sup>30</sup> In whatever scope or scale, this requirement clarifies that government may forcibly take private property only when necessary to fulfill the individual's obligations to society as a whole. Indeed, neither reason nor justice can justify unfairly taking one's property and giving it to another.<sup>31</sup> It is the owners' social obligation that legitimizes the government's power to interfere with private property in the first place.<sup>32</sup> There will inevitably be varying interpretations of what constitutes a "public" government objective, but there remains no dispute that the justification for takings must begin with the individual's obligation to society.<sup>33</sup> Therefore, the "publicness" of the goal for taking one's property is intended to protect against a

27. For a comprehensive summary of due process in takings proceeding in different states, see *id.* at 1321–27. D. Zachary Hudson demonstrates how both state and federal courts embrace the importance of due process as a precondition to governmental intervention in one's property rights. *Id.*

28. For the argument that due process protects against governmental abuse of power, see *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."); Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance out of Substantive Due Process*, 16 U. DAYTON L. REV. 313 (1991). For the implications of this argument in takings law, see Hudson, *supra* note 26, at 1287.

29. U.S. CONST. amend. V.

30. See, e.g., GRUNDGESETZ [GG] [BASIC LAW ART. 14.3], *translation* at <https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510> [<https://perma.cc/9FSH-K3DF>] ("public interest"); Land (Acquisition for Public Purposes) Ordinance §§ 2, 7 (1943) ("acquisition for public needs"); S. AFR. CONST. § 25, 1996 ("public purpose or public interest").

31. See *Calder v. Bull*, 3 U.S. 386, 387–88 (1798).

32. Alexander, *supra* note 4, at 776 ("Eminent domain is a legal and political process for determining just what that responsibility is. At its most general level, the power of eminent domain represents our collective judgment that the state is justified in demanding of us, as members of the political and social community that nurtures us as flourishing individuals, under certain conditions, the sacrifice of title to our land in exchange for just compensation, measured at fair market value.").

33. *Id.* at 776–77.

governmental taking that exceeds the individual's obligations to society.<sup>34</sup> This requirement sketches the bounds of what should and should not be considered a "fair" and legitimate burden imposed on individual property owners. The "fairness safeguard," therefore, is designed primarily to prevent the government from taking private property in a manner that unfairly distributes burdens in society.

The third safeguard incorporated in takings law in most Western jurisdictions is mandatory compensation.<sup>35</sup> The requirement that owners be compensated when their property is coercively taken is mainly intended to ensure economically efficient execution of the purpose for which the land was expropriated.<sup>36</sup> However, because governmental taking is compulsory, it operates outside the boundaries of the free market. This disconnect gives rise to a concern about inefficiency in the implementing procedures of the public project, which is expressed in two ways. First, in the form of a fiscal illusion: government officials might engage in inefficient exercises of eminent domain, because they are likely to see only the public benefit of takings while ignoring the cost to the owners.<sup>37</sup> If not required to compensate owners, the expropriating authorities might disregard the property's value when calculating the overall costs of the acquisition itself.<sup>38</sup> This fiscal illusion disrupts the economic calculus by which the government executes the taking and is therefore likely to damage its efficiency.<sup>39</sup> Second, the compensation, or lack thereof, also affects property owners' attitudes towards investing in their land.<sup>40</sup> Lack of compensation or partial compensation may lead owners to adopt an under-investment policy to avoid financial loss in case their

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34. *Id.* at 777 ("The fact that the power of eminent domain is collective creates an obvious risk of abuse. The political community is justified in demanding this entitlement sacrifice only to the extent that the demand represents a bona fide determination of what is in the community's best interests by a legitimate representative expression of that community.").

35. U.S. CONST. amend. V.

36. See generally Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1173 (1967).

37. See Levine-Schnur & Parchomovsky, *supra* note 20 and accompanying text.

38. THOMAS J. MICELI, *ECONOMICS OF THE LAW* 141 (1997); POSNER, *supra* note 19, at 58 ("The simplest economic explanation for the requirement of just compensation is that it prevents the government from overusing the taking power."); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 794 (2006); James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277, 1297 (1985).

39. See Heller & Krier, *supra* note 17, at 1001.

40. See Blume et al., *supra* note 22, at 71, 72, 82.

property is taken by the government.<sup>41</sup> If the government elects to use a non-compensation or a partial compensation policy, owners may decide not to develop or invest in their property because they fear that if their property is expropriated, they will not be fully compensated for these investments. Contrarily, full compensation may lead owners to adopt an attitude of over-investment that will burden the whole of society to finance the owners' idiosyncratic investments.<sup>42</sup> That is to say, if government is too quick to compensate, owners may disregard economically desired level of investment as they assume they would be compensated fully for any investment in the property. These impacts on owners' investment choices have a bearing on aggregate welfare. They also affect the efficiency of governmental takings, as they skew the price tag that the government will have to pay to accomplish the public need.<sup>43</sup>

These three safeguards, all incorporated in American takings law as well as in most other Western jurisdictions' expropriation laws, provide threefold protection against the concerns that are inherent in compulsory taking of property. It is important to recognize, however, that each safeguard is implemented on a continuum that moves from a low measure of protection to a high one.

The "procedural safeguard," for example, calls for transparent and participatory procedures that give landowners a platform for expression and hearing rights. To achieve this result, various jurisdictions demand the existence of numerous and diverse procedures, such as mandatory notification to owners before the taking begins,<sup>44</sup> first offer to and negotiation with owners,<sup>45</sup>

41. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 736 (1973) ("If a person feels that the market undervalues his damage, he may be unusually sensitive and the best cost avoider of the losses resulting from that hypersensitivity."). See also Blume et al., *supra* note 22 at 71, 72, 82 (discussing the effect of compensation rules on owners' future investment decisions).

42. See Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 622 (2013) (discussing the implications of the compensation on the owner's investment policy); Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 882 (2007) (arguing that full compensation creates "a moral hazard problem" since "full recompense distorts property owners' incentives").

43. See Ellickson, *supra* note 41, at 736.

44. For a comprehensive review of due process procedures in different states in the United States, see Hudson, *supra* note 26, at 1322–27. For a comprehensive review about the procedural requirement in expropriation proceedings in Europe, see EXPROPRIATION LAW IN EUROPE (Jacques Sluysmans et al. eds., 2015).

45. See, e.g., ALA. CODE §§ 18-1A-22, 18-1A-24, 18-1A-74 (LexisNexis 2007); IDAHO CODE ANN.

mandatory hearings and the provision of information,<sup>46</sup> and transparent procedures that are subject to public and judicial review.<sup>47</sup> But procedural protection in eminent domain proceedings are not standardized — each state may require some procedures and not require others.<sup>48</sup> These differences among jurisdictions regarding the scope and scale of procedural requirements display a continuum of implementation, from the bare minimum requirements to heavy and elaborate procedural protections.

The “fairness safeguard” is implemented on a spectrum with respect to the “publicness” of the project for which the property is taken. At one end are so-called “hard” public objectives — those that directly relate to providing essential services such as transportation, health, and education.<sup>49</sup> At the other end are “soft” public objectives achieved by private entities, which only indirectly lead to increased public welfare. A notable example of a “soft” public objective is seen in *Kelo v. City of New London*, a case decided by the United States Supreme Court in 2005.<sup>50</sup> In *Kelo*, the City of New London, Connecticut, used its eminent domain authority to seize private property to sell to private developers.<sup>51</sup> The City’s justification was that developing the land would create jobs and increase tax revenues.<sup>52</sup> The Court concluded that the City’s compulsory taking, in order to sell the property for private development, qualified as a “public use” within the meaning of the takings clause of the Fifth Amendment.<sup>53</sup> While this ruling provoked both legal and public

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§§ 7-706 to 7-710 (West 2004); IND. CODE ANN. §§ 32-24-1-3 to 32-24-1-16 (LexisNexis 2002); IOWA CODE ANN. §§ 6B.1 to 6B.3 (West 2008); MONT. CODE ANN. §§ 70-30-111, 70-30-202 (West 2009) and N. D. CENT. CODE ANN. §§ 32-15-06.1 (West 2017).

46. See Hudson, *supra* note 26, at 1322–27.

47. *Id.*

48. For example, while both Alabama and Kansas provide owners with due process in takings procedures, Alabama law requires prior offer and negotiation, full pre-condemnation hearing, and notice, while Kansas law requires full pre-condemnation hearing and notice but does not condition the taking on the authority’s prior offer and negotiation with owners. See ALA. CODE §§ 18-1A-22, 18-1A-24, 18-1A-74 (LexisNexis 2007); KAN. STAT. ANN. §§ 26-501 to 26-517 (2000).

49. See, e.g., *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66 (1925) (confiscation for military base); *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707–08 (1923) (confiscation for highways).

50. *Kelo v. City of New London*, 545 U.S. 469 (2005).

51. *Id.* at 473–74.

52. *Id.* at 469–70.

53. The case will be explained in depth *infra* Section IV.A.

backlash,<sup>54</sup> the holding sketches how wide the boundaries are for “publicness” in expropriations.

The “efficiency safeguard” exists on a continuum relating to the rate of compensation that should be paid — or, put another way, the type of remedy that should be afforded — to owners. In general, American takings law, like most Western jurisdictions, embraces a compensation standard based on the fair market value of the taken property.<sup>55</sup> Nevertheless, some states supplemented this universal standard with compensation for loss of goodwill or with relocation assistance. Additionally, after the *Kelo* ruling some states amended their takings law, requiring authorities to pay up to 200% of the taken property’s market value in takings meant for economic development.<sup>56</sup> Therefore, while the fair market value of the property serves as the universal compensation standard, it might be amended to provide additional compensation.

In summary, the three safeguards incorporated in governmental takings law are intended to protect against the realization of the concerns surrounding coercive government power and its accompanying implications. These safeguards attempt to ensure that the government’s power to forcibly take private property is exercised in a proper, fair, and efficient way. Nevertheless, as discussed below, setting a high bar for the implementation of all the protective mechanisms simultaneously might, at times, defeat the basic and much-needed purpose of takings power itself.

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54. For a review of the post-*Kelo* political and public backlash, see generally SOMIN, *supra* note 16, at 135–64.

55. This rule is subject to two narrow and seldom applied exceptions: fair market value does not apply where it would be too difficult to measure or where manifest injustice would result. *See* *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). For a comprehensive review of the American ruling on this issue, see generally Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677 (2004).

56. In response to the United States Supreme Court decision in *Kelo*, several states made changes to their expropriation laws to determine the rate of compensation at above market value. *See, e.g.*, MICH. CONST. art. X, §2 (amended 2006); CONN. GEN. STAT. §§ 8-127(b)(6)(D), 8-193(b)(1) (2010); S.B. 167, 2007 Leg., Reg. Sess. (Conn. 2007) (requiring payment of “not less than 125 percent of that property’s fair market value, in addition to any other reimbursement allowed by law”). *See also* H.B. 1010, Leg. (Ind. 2006) (requiring payment of compensation when the condemned property is the person’s primary residence at a rate equal to 150 percent of fair market value); S.B. 323, Leg. (Kan. 2006) (increasing the level of compensation to landowners whose property is condemned for private economic development purposes to 200 percent of the average appraised value of the property).

### III. IMPERFECT TAKINGS: A NON-UTOPIAN MODEL FOR TAKINGS LAW

Takings law incorporates three safeguards to protect against the concerns inherent in governments' takings powers, but the full execution of these protections can often be challenging. Consider, for example, times of crisis. In cases of emergency, authorities might need to take certain lands without abiding by all the procedures that apply to compulsory acquisition under normal conditions. In other cases, private entities might have to be involved to fully realize the purpose of the governmental taking. Or the government might need to supply services and products to society but have insufficient resources to fully compensate owners for the value of the taken property. These "imperfect" situations complicate the equation: Is expropriation of private property justified only with *complete* implementation of the three safeguards? Or are there situations where implementation can be relaxed?

This Part of the Article contends that the original rationale for incorporating the three safeguards into takings law also justifies, in certain cases, easing their implementation. As mentioned above, underlying the three safeguards is the desire to ensure that expropriation of private property is done ethically, fairly, and with economic efficiency.<sup>57</sup> However, it is important not to lose sight of the fact that the overarching purpose of takings law is to enable the government to provide essential needs to its citizens. Setting too high a bar that demands strict and rigid implementation of the three safeguards will likely hinder the government's ability to accomplish that purpose and weaken a fundamental assumption that underlies the incorporation of the safeguards in expropriation law: that there should be a balance between the government's duty to meet society's essential needs and the execution of this duty in a suitable way.

To achieve this balance, governments must understand the specific protections that each of the safeguards provides. As mentioned above, each safeguard protects directly against one of the three concerns inherent in the governmental takings power. But each safeguard reaches beyond this reason for being; that is, each also protects, in differing degrees, against the evils that the other two safeguards are intended to mitigate.

The procedural safeguard protects primarily against corruption — governmental abuse of its power to take private property. Indeed,

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57. *See supra* Part II.



the implementation of regulated and transparent takings procedures, such as the duty to consult with experts or to hold mandatory hearings, reduces the possibility that governments will expropriate private property without restraint.<sup>58</sup> But these procedures also protect against unfair execution of governmental expropriation. Well-known, transparent, and participatory public procedures ensure that authorities maintain a balance between providing societal needs through compulsory acquisition while considering the burdens placed on individuals losing property. The likelihood that burdens will be imposed in an unbalanced manner decreases when authorities have to justify their takings, and, no less importantly, when these takings are overt and exposed to public or legal review. Adherence to such procedures also makes inefficiency in executing governmental takings less likely. Through structured takings procedures, the government and the property owner can reveal to each other the costs that will be involved in executing the taking. As mentioned previously, the main inefficiency concern in governmental takings is that authorities may fall prey to a “fiscal illusion,” where they exercise their coercive takings power without accounting for the value of the property.<sup>59</sup> Proceedings involving landowners, especially ones in which owners have the right to present claims that include property values before the authority itself, significantly mitigate the concern that the authorities will ignore or overlook this value.<sup>60</sup> When conceptualized this way, the procedural safeguard offers protection against all three concerns inherent in takings law — most directly against government abuse, and secondarily against unfair or inefficient processes.

A similar argument can be made about the fairness safeguard, which protects principally against the risk of inequity in coercive takings.<sup>61</sup> The primary concern is that the government might exercise its duty to provide for society’s needs in an unbalanced manner. This improperly places societal burdens disproportionately on the shoulders of private property owners. The public use requirement protects against this possibility because it clarifies the boundaries of the sacrifice demanded from individual citizens.<sup>62</sup> But a more in-depth examination reveals that this requirement also provides protection against governmental corruption and economic

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58. Hudson, *supra* note 26, at 1287.

59. *See supra* notes 19–21 and accompanying text.

60. Shai Stern, *Remodeling Just Compensation: Applying Restorative Justice to Takings Law Doctrine*, 30 CAN. J. L. & JURIS. 413, 440 (2017).

61. *See supra* notes 29–33 and accompanying text.

62. *Id.*

inefficiency. The requirement that government takings be used only for public needs mitigates the possibility of abuse of power by limiting the purposes for which government can properly expropriate private property. The “publicness” requirement also addresses the concern of inefficiency in governmental takings, because the government justifies its power to take private property by latching onto a market failure — without government intervention, the reasoning goes, the public need will not be met.<sup>63</sup> But in cases where the aimed project involves private commodities rather than public ones, there is no economic justification for the government to exercise its compulsory takings power. Like the procedural safeguard, ensuring fairness in takings protects principally against inequitable distribution of burdens, but also provides secondary guarantees against corruption and inefficiency.

Finally, the efficiency safeguard is primarily intended to ensure the economic efficiency of the governmental expropriation by requiring just compensation for compulsory taking. But this safeguard also reduces the risks of governmental corruption and unfairness. The requirement that owners receive compensation for taken property reduces the likelihood of governmental corruption because it attaches a price tag to the taking. If the taking authority is exempt from granting compensation to the owners, it has an incentive to take private property — governmental gain at no cost. This perverse incentive might motivate authorities to take private property even when the taking does not provide for society’s needs, and instead only feeds the interests of those close to power. Attaching a cost to governmental takings reduces authorities’ incentive to exploit their power for improper purposes, since they will have to pay owners for the taken property.<sup>64</sup> The compensation requirement also reduces unfairness in the governmental takings process, mainly with respect to the concern that an unbalanced burden will be imposed on property owners’ shoulders for the benefit of society at large. The compensation requirement accounts for at least part of the property’s worth.<sup>65</sup> In this sense, compensation acts as a counterweight to the loss incurred by owners, thereby reducing the concern that they will

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63. See Garnett, *supra* note 2, at 139.

64. Abraham Bell & Gideon Parchomovsky, *The Hidden Function of Takings Compensation*, 96 VA. L. REV. 1673, 1675 (2010) (“Mandatory compensation dramatically reduces the profits politicians can derive from takings. As a result, it takes away much of the incentive to use the takings power to private ends and refocuses their attention on the public good.”).

65. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

have to bear the entire burden of providing for society's needs. Demanding just compensation thus not only ensures efficient takings procedures, but also acts to dissuade corrupt government practices and to provide some fairness into an otherwise unfair transaction.

The safeguards thus operate through an interplay: in "perfect" conditions, each safeguard provides protection against all three risks inherent in governmental expropriation of private property, primarily against one and partially against the other two. This interplay is particularly important for "imperfect" circumstances, when the government is justified in reducing the implementation of one of the safeguards because all three safeguards overlap in protections. As implementation of one safeguard is lowered, the concern that safeguard is primarily intended to alleviate can still be addressed by heightening implementation of the other two safeguards. This broadens the circumstances in which government can properly exercise its eminent domain powers. Even in imperfect circumstances when one of the protective mechanisms must be partially weakened, takings can remain legitimate as long as the other two protective mechanisms are fully implemented.

Think, for example, of a situation in which the state is required to expropriate private property in response to an urgent security threat.<sup>66</sup> In such a situation, it is difficult to follow regulated and transparent procedures, and trying to do so might endanger the public by hindering the government's taking. Can property owners be satisfied with the existence of only the other two safeguards — public need (fairness) and compensation (efficiency) — in order to validate the expropriation? Or, consider a scenario in which the authority's financial situation does not enable it to purchase property needed to fulfill an essential societal need at full market price. Does the government's poverty negate the taking's legitimacy? Finally, imagine a situation in which the government seeks to advance a goal with the help of private entities, or one where the purpose for which the government seeks to expropriate property is achievable only when private entities profit financially from the governmental taking. Would involvement of such private parties (and possibly their profiting from the taking) undercut the taking's legitimacy?

These scenarios are not hypothetical. They have occurred in a considerable number of governmental takings executed in the United

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66. See Brian A. Lee, *Emergency Takings*, 114 MICH. L. REV. 391, 398 (2015) (reviewing cases of emergency takings for security reasons).

States and around the world.<sup>67</sup> This Article, therefore, calls for rejecting the rigid, unrealistic framework of implementing all protections against compulsory government takings and acknowledges that the interplay among the three safeguards remedies the flaws that arise when any one of them is suppressed. This acknowledgment depends upon two necessary conditions: first, that all three safeguards remain in effect, however partially; second, that lowering the bar for the implementation of one of the safeguards demands stricter adherence to the other two safeguards.

The first condition suggests that none of the safeguards can be quashed entirely because each safeguard protects directly against one of the concerns inherent in government's power to take private property. As the Supreme Court explained in *Lingle v. Chevron*: "If a government action is found to be impermissible — for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process — that is the end of the inquiry. No amount of compensation can authorize such action."<sup>68</sup>

The second condition recognizes the interplay amongst the safeguards, as well as the cumulative protection they provide against the three inherent concerns. This interplay provides a platform to address imperfect circumstances in which governments aim to provide for society's needs but lack time or funding. The application of the interplay model to imperfect circumstances is characteristic of many expropriations in the United States and worldwide and justifies governments' use of takings power despite one of the aforementioned deficiencies. The interplay model also permits us to rethink some old, outdated conventions that shaped current takings law.

#### IV. RETHINKING OLD CONVENTIONS

The interplay model proposed in this Article aims to provide a normative justification for imperfect takings, when authorities must execute their takings power despite only partially employing one of the three safeguards. This reimagining of compulsory government takings provides an explanation of, and a justification for, governmental takings that seem at odds with current takings law, as

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67. *Id.* at 397–401. See also Carol L. Zeiner, *Establishing a Leasehold Through Eminent Domain: A Slippery Slope Made More Treacherous by Kelo*, 56 CATH. U. L. REV. 503, 523 (2007) (discussing governments' need to compromise process to address disasters); Hudson, *supra* note 26, at 1310.

68. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

well as an opportunity to rethink old conventions in takings jurisprudence.

### A. *Kelo* Reconstructed: Compromising Public Use

Much has been written about the ongoing dismantling of the “publicness” standard required by the “public use” of takings, and on the compromising treatment that courts give to expropriation of private property for purposes that are not truly public.<sup>69</sup> The most prominent example of this is found in *Kelo*.<sup>70</sup> There, the Supreme Court found that the “economic development” planned by the City of New London was a legitimate public use; that is, it was a project that met the constitutional requirement that takings ought not be carried out unless for public use.<sup>71</sup> In *Kelo*, New London confiscated private property owned by Suzette Kelo and her neighbors in order to establish a research facility for the pharmaceutical company Pfizer.<sup>72</sup> The private status of the entity expected to use the taken property was not debated; rather, the City argued that the large research center would create new jobs, increase tax and other city revenues, and revitalize a depressed urban area.<sup>73</sup> These benefits to the city and its residents, the City maintained, satisfied the public use requirement. Kelo and her neighbors protested that these marginal benefits to society could not disguise the fact that the City took private property from a group of private owners and gave it to a private company.<sup>74</sup> The Supreme Court sided with New London. In a 5-4 decision, the Court held that the general benefits a community might enjoy from economic growth qualify private redevelopment plans as a permissible “public use” under the Takings Clause of the Fifth Amendment.<sup>75</sup>

Scholars and jurists regard *Kelo* as a challenge to the public use requirement. Some have argued that legitimizing expropriations of private property for economic development will inevitably harm

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69. See, e.g., Philip Nichols Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615 (1940); Lawrence Burger, *Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1977); Ilya Somin, *Is Post-Kelo Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931 (2007); Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934 (2003).

70. *Kelo v. City of New London*, 545 U.S. 469 (2005).

71. *Id.* at 489–90.

72. *Id.* at 473–75.

73. *Id.* at 472.

74. *Id.* at 477–78.

75. *Id.* at 489–90.

vulnerable private property owners, because it provides another excuse for authorities to expropriate property in blighted neighborhoods.<sup>76</sup> Various states across the United States amended their expropriation laws in response to the Court's rulings in *Kelo*, mostly by increasing the amount of compensation that private property owners would be entitled to in the event of government taking for purposes of economic development.<sup>77</sup> But is the public and legal backlash against *Kelo* justified? Was the *Kelo* Court right to legitimize the taking?

To answer this question, we must return to the essence of the public use requirement: to provide a method for government to fairly provide for societal needs.<sup>78</sup> This was incorporated into the Takings Clause primarily to mark the boundaries of fairness when government exercises coercive power to take private property.<sup>79</sup> The inclusion of constitutional safeguards demonstrates that using coercive taking to redistribute property between two private individuals is inappropriate,<sup>80</sup> but its use to satisfy the needs of society as a whole might be acceptable. To determine whether a compulsory taking complies with the public use requirement, one needs to check whether it fulfills a societal need that the government is expected to provide.

The Court had two options in *Kelo*: it could define "public use" as including only those essential social needs that will directly serve the public as a whole, or it could recognize "public use" more broadly to include projects that provide either essential or marginal societal benefits. The former of these interpretations relies on a binary conception of public use, one in which any public project can be

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76. See, e.g., *id.* at 521–22 (Thomas, J., dissenting) ("Allowing the government to take property solely for a public purpose is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect 'discreet and insular minorities,' surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects."); see also Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 546 (2006); Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 205–06 (2006).

77. As mentioned, several states changed their expropriation laws in reaction to *Kelo*. See *supra* note 56.

78. See *supra* notes 13–16 and accompanying text.

79. *Id.*

80. See *Calder v. Bull*, 3 U.S. 386, 388 (1798).

characterized as only one of two alternatives — it is either for an essential “public use,” or it is not. The latter, in contrast, recognizes a linear approach — a continuum that stretches between the most essential public uses on one end, to the projects whose contribution to the public is marginal on the other. Services on the essential end include security, safety, public health, education, and transportation; on the marginal end are projects that give expropriated property to private entities, and the public enjoys the secondary benefits of these private investments. In a series of rulings, the Court rejected the binary conception and chose to apply the linear one.<sup>81</sup> Justice Thomas, in his dissenting opinion in *Kelo*, describes the Court’s choice of the linear approach as “the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning.”<sup>82</sup> According to Justice Thomas, therefore, the Court’s choosing to apply the linear approach to public use coincides with nullifying the public use requirement altogether.

The interplay model proposed in this Article offers a different perspective on the Court’s adoption of the linear approach, which results in a more sympathetic conceptualization of the *Kelo* ruling. Under the interplay model, the Court’s decision to apply the linear approach does not mean that the distinctions between different levels of “publicness” in various projects must be rejected. On the contrary, adopting the linear approach sharpens the distinction between projects with a high level of publicness, such that their implementation is essential to the public as a whole, and projects that contribute primarily to private entities and provide only marginal benefits to the public. It would be incorrect to view the Court’s ruling in *Kelo* as stating that projects with only marginal public benefit are no different from those directly supplying vital public needs. The correct interpretation of the Court’s legitimizing marginal benefit projects as “public use” is that there is a degree of publicness to each project, which varies depending on particular instances and conditions. The interplay model functions in precisely this manner: as long as the government project falls somewhere on the continuum, such that the government can point to a public benefit that would result from implementing the project, it is acceptable to compromise on the extent of the project’s publicness as long as the government ensures strict implementation of the other two safeguards. Indeed, to

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81. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984); *Berman v. Parker*, 348 U.S. 26, 33–34 (1954); *Kelo*, 545 U.S. at 469.

82. *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting).

the extent that the other two safeguards — in this case the procedural and efficiency safeguards — will be performed with heightened urgency, we might legitimize governmental taking of private property even if the project for which the property is taken compromises the public use requirement.

To illustrate the interplay model, let us reconsider *Kelo*. The Court compromised the public use requirement in government takings when it determined that “economic development” of a blighted area by a private entity constituted a legitimate public use.<sup>83</sup> Certainly, this is not equivalent to circumstances in which land is expropriated for essential public needs. At the same time, it is worth recognizing that the project for which the land was expropriated in *Kelo* still retained a degree of publicness, however limited. The public benefits of establishing a research and development center in New London were an improvement, for example, on the poor employment conditions in the city. Therefore, while economic development was not primarily a public use in the strict understanding of the term, it nevertheless remained on the continuum such that the public use requirement was not fully compromised.

According to the interplay model, compromising on one of the three safeguards does not coincide with denying the legitimacy of the expropriation altogether. Rather, this compromise heightens a government’s duty to ensure the implementation of the other two safeguards. In the case of Suzette Kelo, then, the proper question to ask is whether fair procedure and proper compensation were strictly met. In his book *Little Pink House*, Jeff Benedict follows Suzette Kelo’s journey, from her purchasing the house that was eventually taken by New London, to her travels across the United States after the Supreme Court’s decision.<sup>84</sup> Benedict reveals the long process New London required to execute the taking, which included negotiations, hearings, and notifications.<sup>85</sup> Although neither these procedures nor their outcomes satisfied Suzette Kelo and her neighbors, it should be recognized that they fulfilled New London’s due process requirements.

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83. *Id.* at 479.

84. See generally JEFF BENEDICT, *LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE* (2009).

85. To get a sense of the level of owners’ involvement in the process, see BENEDICT, *supra* note 84, at 140 (“Anger filled the room when members gathered to discuss the city council’s vote. They had done research, circulated petitions, organized letter-writing campaigns, garnered positive publicity, mobilized citizens, attended public hearings, and demonstrated strong opposition to the NLDC’s plan. They had even produced an alternative plan. Nothing had worked . . .”).



The Supreme Court also highlighted the municipality's compliance with due process.<sup>86</sup> After reviewing how New London executed its takings power, Justice Kennedy wrote in concurrence: "The city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes."<sup>87</sup> As for the compensation requirement, at no point in *Kelo*'s long legal journey did she argue that the compensation was flawed, or that she and her neighbors were not offered the fair market value of their property. For purposes of this Article, therefore, let us assume that the compensation requirement was fully satisfied.

Evaluating Suzette Kelo's case through the interplay model, it is evident that the procedural and fairness safeguards met the requisite high bar that resulted from weakening the public use safeguard. An examination of the Court's ruling in *Kelo* reveals that the Court considered and implemented — even if unintentionally — the interplay model proposed in this Article. The reason that the Court approved New London's taking, even though the public use requirement was set at a relatively low threshold, was the expropriation's fulfillment of the other two requirements of the interplay model. Public use, though compromised, was not eviscerated, and the other two safeguards were employed scrupulously.

### B. Emerging Takings: Compromising Procedures

The Constitution binds the government's power to take private property with the duty to provide due process to owners.<sup>88</sup> Initially, courts varied in how they applied procedural due process requirements to government interference with private property. The Supreme Court's decision in *United States v. James Daniel Good Real Property* resolved this variance, cementing the constitutional basis for applying due process rights to government takings proceedings.<sup>89</sup>

In *Good Real Property*, the Supreme Court was asked to determine whether the Due Process Clause of the Fifth Amendment requires the government to afford owners notice and opportunity to

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86. *Kelo*, 545 U.S. at 493.

87. *Id.* at 493.

88. U.S. CONST. amend. V ("[N]or be deprived of life, liberty, or property, without due process of law.").

89. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 46 (1993).

be heard before seizing their property in a civil forfeiture case.<sup>90</sup> The police found drugs and drug paraphernalia in Good's home, and he pleaded guilty to criminal charges.<sup>91</sup> Almost four-and-a-half years later, the government seized Good's property without prior notice or an adversarial proceeding.<sup>92</sup> Good asserted that he was deprived of his property without due process of law and that the forfeiture action was invalid because it had not been timely commenced.<sup>93</sup> The Supreme Court stated that the Due Process Clause of the Fifth Amendment guarantees that every property owner must receive notice and an opportunity to be heard before the government deprives him or her of property.<sup>94</sup>

Though the case did not deal directly with the government's power to confiscate private property for public use, the Court's conclusion about the essence of Fifth Amendment due process provided solid ground for recognizing due process rights in eminent domain proceedings.<sup>95</sup> The Court's discussion of the role that procedural requirements play in preventing governmental abuse of takings power was clear. The purpose of the right to prior notice and hearing, Justice Kennedy wrote, "is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . ."<sup>96</sup> *Good Real Property* thus dispelled any uncertainty surrounding the government's duty to provide due process to property owners in expropriation proceedings. The government is obligated to notify owners of its intentions and to involve them in the takings process, all to reduce the concern that the government will abuse its power.<sup>97</sup> This clear doctrine in mind begs the question: Can the government legitimately compromise on its duty to provide owners with due process in imperfect circumstances? Can an owner be deprived of his due process rights — prior notice and hearing — in a case of emergency?

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90. *Id.*

91. *Id.*

92. *Id.* at 47.

93. *Id.*

94. *Id.* at 48.

95. Hudson, *supra* note 26, at 1302.

96. *Good Real Prop.*, 510 U.S. at 53 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972)).

97. *Id.* at 62; *see also* Hudson, *supra* note 26, at 1287.

The *Good Real Property* Court provided an answer to this question, suggesting that the general rule that mandates prior notice and hearing might tolerate some exceptions.<sup>98</sup> But these exceptions, which should only be recognized in “extraordinary situations where some valid governmental interest is at stake,”<sup>99</sup> do not completely excuse the government from its procedural obligations. Rather, they ease implementation of procedural obligations by allowing the government to postpone the hearing until after the taking is executed.<sup>100</sup> The *Good Real Property* Court enforced procedural due process as a barrier to governmental abuse of power while simultaneously recognizing that imperfect situations may require some lessening of — though not entirely eliminating — this duty.

This conclusion reflects the interplay model, which allows for only partial realization of the procedural safeguard in order to accommodate imperfect circumstances.<sup>101</sup> But the interplay model advances a second condition: it is not enough to ensure that no safeguard is entirely eliminated; the government must also raise the bar for implementation of the other two safeguards. In other words, if the government is to legitimize its failure to fully meet procedural obligations, the taking should be for a vital public use and the owners must be adequately compensated.

A careful reading of *Good Real Property* shows that the decision complies with this second condition as well. In recognizing that there might be circumstances that justify an exception to government’s duty to provide due process in expropriation, Justice Kennedy embraced criteria proposed in another Supreme Court ruling, *Mathews v. Eldridge*.<sup>102</sup> In *Mathews*, the Court addressed whether the Due Process Clause of the Fifth Amendment requires that a recipient of Social Security disability benefits be afforded an opportunity for a hearing prior to termination of those benefits.<sup>103</sup> The *Mathews* Court suggested that determining whether Fifth Amendment due process requirements had been met in a particular case cannot be done “technically” — that is, without considering time, place, and circumstances.<sup>104</sup> Instead, the Court offered three criteria to determine whether the burdens of due process were met in any

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98. *Good Real Prop.*, 510 U.S. at 53.

99. *Id.*

100. *Id.*

101. *See supra* Part III.

102. *Good Real Prop.*, 510 U.S. at 53; *Mathews v. Eldridge*, 424 U.S. 319 (1976).

103. *Mathews*, 424 U.S. 319, at 323.

104. *Id.* at 334–35.

given case: “the private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government’s interest, including the administrative burden that additional procedural requirements would impose.”<sup>105</sup> The *Mathews* analysis, adopted by the *Good Real Property* Court, supports the connection between the three safeguards that make up the interplay model: when the bar on one safeguard is lowered, it must be raised for the other two.

According to the *Mathews* analysis, mitigating government’s procedural obligations should align with the government’s interest in executing the taking. In other words, the greater the interest of the government — or the public — in executing the taking, the greater the willingness to ease the procedural protections. This suggests that the procedural requirements imposed on the government might be mitigated only for the most essential public uses. The logic behind this conclusion is self-evident: if the government is pressed to provide some public good, and so seeks to weaken the procedural protections it owes to property holders, the taking must be for the most essential and urgent public needs. The government should not be able to ease its procedural obligations to take property for noncritical purposes, even if these projects would eventually benefit the public.

The *Mathews* analysis also impliedly supports the proposition that mitigating government’s procedural obligations should be conditioned on raising the bar for the efficiency safeguard. While neither *Mathews* nor *Good Real Property* were dealing directly with takings of real property — and, therefore, do not deal with compensation to owners — they nonetheless relate to the link between compromising government’s procedural obligations and ensuring efficiency and aggregate welfare.<sup>106</sup> The *Mathews* analysis specifically requires the government to consider the deprived private interest, the costs of erroneous deprivation, the probable value of the safeguards, and the administrative costs of the action.<sup>107</sup> These considerations aim to achieve the same goal as the compensation requirement in takings law — to ensure that the governmental action will internalize the social costs involved. As both *Mathews* and *Good Real Property* indicate, mitigating government’s procedural obligations requires a strict examination of the impact this would

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105. *Id.* at 335.

106. *Id.*; *Good Real Prop.*, 510 U.S. at 44.

107. *Mathews*, 424 U.S. at 335.

have on the overall efficiency of the action. This is reflected in the interplay model: if the government mitigates its procedural obligations it must simultaneously ensure strict implementation of the efficiency safeguard. Thus, the *Mathews* analysis, adopted by the *Good Real Property* Court, aligns with the interplay model's second condition — compromising the procedural safeguard requires raising the bar for the implementation of both the fairness safeguard (i.e. only essential public uses) and the efficiency safeguard (i.e. full compensation).

### C. Budgetary Constraints: Compromising Compensation

Another convention that the interplay model urges us to rethink is that government takings ought to be executed only in exchange for fair market value compensation. The “just compensation” clause of the Fifth Amendment was interpreted by courts as a duty imposed on the appropriating authorities to provide owners with the fair market value of the taken property.<sup>108</sup> The courts established fair market value as the universal standard for just compensation, which is now a prerequisite to legitimate property confiscation.<sup>109</sup>

But what if the government cannot pay owners the fair market value of their property? The most prominent example of such a situation is in emergencies — imperfect circumstances. Consider, for example, a serious disaster that requires the local government to perform some large-scale activities. Among other things, the local government is required to expropriate land or demolish structures on private property to cope with the disaster and its consequences. The costs of dealing with such a disaster likely exceed the financial capacity of governments, particularly small, local governments. But the importance of rapid and effective assistance from the authorities in emergency events is clear. Faced with this impossible situation, how must the government act? Should it expropriate private property even though it cannot pay the fair market value to the owners, or should it limit its relief and refrain from undertaking

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108. See *Olson v. United States*, 292 U.S. 246, 255 (1934) (“The statement in that opinion . . . that ‘no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner’ aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes . . . . That equivalent is the market value of the property at the time of the taking, contemporaneously paid in money.”); see also *United States v. 50 Acres of Land*, 469 U.S. 24, 25 (1984); *United States v. Miller*, 317 U.S. 369, 374 (1943); *Boom Co. v. Patterson*, 98 U.S. 403, 407–08 (1878).

109. *Boom Co.*, 98 U.S. at 407–08.

activities that exceed its budget? And, if we allow government to take property in order to provide services to the public regardless of its financial capability, should this be limited only to emergencies?

Current takings jurisprudence distinguishes between cases of emergency in which the government decides to confiscate private property and circumstances where the government chooses to destroy property to thwart a grave threat.<sup>110</sup> When the government confiscates property, it is obligated to compensate the owner with an amount equal to the fair market value of the property.<sup>111</sup> But when the government destroys the property, the owner is not entitled to compensation.<sup>112</sup> This destruction exception, which denies property owners' right to compensation, is embedded in the law as the "necessity" exemption or the "non-compensation principle."<sup>113</sup> This principle has faced criticism, mainly because it leaves property owners uncompensated even though their property was destroyed.<sup>114</sup> The importance of this principle, however, only becomes more acute as governments around the world are forced to deal with severe weather or control the spread of diseases that endanger public health and law enforcement.<sup>115</sup> These extreme scenarios can be thought of as imperfect, emergency cases that justify denying compensation to the landowner when the authorities destroy their property.

The application of the non-compensation principle to emergency situations has garnered much criticism from commentators,<sup>116</sup> but aiming to identify its underlying justification reveals important implications in takings law. Examining the history of the non-

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110. *See, e.g.*, *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 154 (1952) ("[T]he common law had long recognized that in times of imminent peril . . . the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.").

111. *See Olson*, 292 U.S. at 255.

112. *Caltex (Philippines), Inc.*, 344 U.S. at 149.

113. DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 118–19 (2002).

114. *See* Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127, 127 (2013); *see generally* Derek T. Muller, Note, "As Much upon Tradition as upon Principle": A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment, 82 NOTRE DAME L. REV. 481 (2006). For a similar example from a century ago, *see* Henry C. Hall & John H. Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration*, 1 ILL. L. REV. 501, 514–24 (1907).

115. *Lee*, *supra* note 66, at 399–401.

116. *See, e.g.*, 1 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 119 367–68 (2d ed. 2011); Susan S. Kuo, *Disaster Tradeoffs: The Doubtful Case for Public Necessity*, 54 B.C. L. REV. 127 (2013); *see generally* Derek T. Muller, Note, "As Much upon Tradition as upon Principle": A Critique of the Privilege of Necessity Destruction Under the Fifth Amendment, 82 NOTRE DAME L. REV. 481 (2006).

compensation principle in American law, Brian Lee suggests that the principle provides governments with an exemption from paying compensation in emergencies not only because of administrative difficulties, but also because they lack the resources required to pay full compensation to owners.<sup>117</sup> Lee further argues that the non-compensation principle does not require the adoption of an “all or nothing” compensation policy; rather, it allows partial compensation, subject to the government’s fiscal capabilities.<sup>118</sup>

The recognition that a government’s budgetary limitations can justify partial or no compensation ought to apply beyond the boundaries of property destruction to thwart a threat. Indeed, it is sensible to apply this justification even in cases where the government is required to expropriate property, rather than destroy it, for public needs. Consider, for example, a local authority that is required to provide its residents with sidewalks, roads, educational institutions, medical institutions, and workplaces. It will be relatively easy for an affluent local authority that has sufficient economic means to provide these needs: the lands required to provide sidewalks or roads will be expropriated from private owners and, in return, the authority will pay the landowners the full market value of the taken property. But this is not the case for poorer, struggling local governments that, due to budgetary constraints, cannot pay the full market value in exchange for property, and thus might not be able to supply essential public goods. In such circumstances, strict compliance to full compensation that matches the market value will undoubtedly impair the ability of poor local authorities to support the vital needs of residents. Denying poorer municipalities the flexibility to expropriate property with only partial compensation, such that they can overcome their budgetary limitations, does not contradict the essence of the takings power.<sup>119</sup> As stated, the power to expropriate property is intended to enable authorities to overcome structural failures so they may provide for the essential needs of society.<sup>120</sup> Ignoring budgetary limitations of local authorities, therefore, leaves them hollow, with empty power, while their residents remain without necessary services. While this concern is relevant to any authority that is struggling with significant budgetary limitations, it increases in cases of emergency,

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117. Lee, *supra* note 66, at 453.

118. *Id.* at 407–10.

119. For a similar argument in the context of zoning and regulatory takings, see Jonathan B. Sallet, *The Problem of Municipal Liability for Zoning and Land-Use Regulation*, 31 CATH. U. L. REV. 465, 465–66, 477–78 (1982).

120. See *supra* notes 1–3 and accompanying text.

when even economically well-established authorities may find themselves struggling due to the amount of public assistance they have to provide.

The interplay model proposed in this Article seeks to address precisely these imperfect situations. Government's power to take private property is primarily intended to enable it to overcome failures that would otherwise prevent it from providing for its constituency's most vital needs. The interplay model can address and justify complex situations in which authorities are forced to pay property owners only partial compensation that amounts to less than the fair market value of the property. Compromising on fair market value, however, raises concerns about the efficiency of the taking.<sup>121</sup> Recall that the compensation requirement primarily aims to safeguard against inefficient takings, which mostly result from authorities' lack of internalization of all social costs.<sup>122</sup> However, the interplay model mitigates the concern that authorities will abuse budgetary limitations as an excuse to take private property at prices lower than the market value. This is because of the two fundamental conditions that underpin the interplay model: that all three safeguards remain at least partially in effect, and that lowering the bar for one of the safeguards demands strict adherence to the requirements of the other two.

Applying these conditions to circumstances when governments struggle with budgetary limitations, but still have to expropriate property to provide social needs, reveals that partial-compensation takings may still be properly executed. This is the case when the taking is only for the most essential societal purposes, in which the public need is clearly defined, and with full respect for the procedural rights of landowners. The interplay model allows authorities struggling with budgetary limitations, which might risk their ability to provide citizens with essential needs, to overcome one of current takings law's paradoxes. It allows for a rethinking of the reasons underlying government's takings power in the first place — that is, the desire to allow the government to satisfy the needs of society.

### CONCLUSION

Imperfect circumstances such as emergencies, crises, and budgetary limitations threaten government's ability to use its takings power to provide for citizens' needs. Strict adherence to takings law's

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121. *See supra* notes 17–21 and accompanying text.

122. *See supra* notes 17–21 and accompanying text.



incorporated safeguards — due process, the public use requirement, and compensation — may deprive the government of the ability to properly provide these public needs, precisely in times of crisis, when these needs are particularly important or threatened. This Article proposes a model that highlights the interplay between all three of takings law's inherent safeguards. This interplay model maintains and provides a normative justification for compromise, when circumstances require, on one of the safeguards. Such a compromise, when implemented according to the interplay model's two conditions, allows governments to provide the public its vital needs even in imperfect circumstances. It also provides an explanation of current eminent domain jurisprudence that seemingly stands at odds with takings law and allows for a rethinking of old conventions.